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IN THE COURT OF APPEALS OF INDIANA

RAY LOTHAMER,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 17A03-0612-JV-597
	)	
DEKALB COUNTY DIVISION OF FAMILY & CHILDREN,	)	
	)	
	)	
Appellee.	)	

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Kevin P. Wallace, Judge
Cause No. 17D01-0503-JT-5

April 4, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The DeKalb County Department of Child Services ("the DCS") filed a petition in DeKalb Superior Court to terminate Ray Lothamer's ("Lothamer") parental rights to his minor son, T.M. The petition was granted and Lothamer appeals, arguing that the evidence was insufficient to support the termination of his parental rights. We affirm.

Facts and Procedural History

The facts most favorable to the termination of parental rights are as follows. T.M. was born on October 9, 2003, to Lothamer and Maylene McClelland ("McClelland"). At the time he was born, T.M. had methamphetamine in his system, and he experienced withdrawal symptoms shortly thereafter. T.M. resided with McClelland, and was removed from her care on two separate occasions. The first occasion was between October 17, 2003, and October 28, 2003. Then on December 27, 2003, T.M. was removed again after McClelland and Lothamer were arrested for manufacturing methamphetamine.

When Lothamer was arrested, he had no idea where his child was, who his child was with, or how his child was being cared for. Lothamer had left T.M. with other people with no plan as to when he would be back to pick him up. At this time, Lothamer knew he was the father of T.M. but had not yet established paternity. In April 2004, after Lothamer was incarcerated, the DeKalb County Title IV-D Office filed a paternity action on his behalf. Several months later, an order establishing paternity was entered.

Lothamer was convicted of dealing in methamphetamine for the offense that occurred on December 27, 2003, and he was sentenced to twelve years of incarceration at the Indiana Department of Correction ("DOC"). According to the DOC, his earliest

release date is June 26, 2009. In addition to this conviction, Lothamer has an extensive criminal history, which includes two convictions of failure to maintain financial responsibility, a conviction for possession of marijuana, a conviction for criminal conversion, a conviction for driving while suspended, a conviction for dealing marijuana, and a conviction for domestic battery.

Since his incarceration, Lothamer has only had one visit with T.M. that took place in the Steuben County Jail in 2004. Lothamer has been incarcerated for all but two months of T.M.'s life. During the two months that Lothamer was not incarcerated, he had not established paternity over T.M., he did not have custody of T.M., and he did not have significant or regular visitation with T.M. While incarcerated, Lothamer has paid no child support for T.M., nor has he sent any gifts or cards to T.M. As a result of this very infrequent contact, T.M. has not developed a parent-child bond with Lothamer. Once Lothamer is released from prison in 2009, he will not have a job, an independent home, a steady source of income, a driver's license, or the ability to care for a minor. Lothamer believes that it could take him a year or two to get into a position where he would be able to care for T.M.

Both times that T.M. has been removed from McClelland's care, he has lived with foster parents Tammy and Edward Steele ("the Steeles"). While living with the Steeles, T.M. has been in the company of several foster siblings and has benefited from an extended family network. His half-brother, I.M., the child of McClelland and an unknown father, has lived with the Steeles since his birth. The Steeles are the only parents that T.M. has ever known, and the Steeles have expressed interest in adopting

both T.M. and I.M. should the parental rights be terminated. McClelland has already terminated her parental rights to T.M., and the DCS plans on pursuing a termination of her parental rights regarding I.M.

The DeKalb County DCS filed a petition for termination of Lothamer's parental rights on March 30, 2005. At the time the petition was filed, T.M. had been removed from Lothamer's care for at least fifteen of the most recent twenty-two months, and the DCS had maintained wardship over T.M. for at least six months pursuant to a disposition order. The trial court held a fact-finding hearing on August 16, 2006. At the hearing, family case manager Debra Stefanelli testified that she believed it was in T.M.'s best interests to terminate Lothamer's parental rights because it will allow T.M. to have permanency and stability that would not be provided otherwise. The guardian ad litem also recommended termination of Lothamer's parental rights. On September 6, 2006, the trial court entered findings of fact and conclusions of law, ordering the termination of Lothamer's parental rights as to his minor child, T.M. Lothamer now appeals. Additional facts will be added as necessary.

Standard of Review

Because the trial court in this case entered findings and conclusions, the specific findings control only as to the issues they cover, and the general judgment controls as to the issues upon which the court has not made findings. McBride v. Monroe County Office of Family & Children, 798 N.E.2d 185, 198 (Ind. Ct. App. 2003) (citation omitted). The specific findings will not be set aside unless they are clearly erroneous, and we will affirm the general judgment on any legal theory supported by the evidence.

Id. When we review the trial court's findings, we neither reweigh the evidence nor judge the credibility of the witnesses. Id. We consider only the evidence and reasonable inferences drawn therefrom, which support the verdict. Id. A judgment is clearly erroneous when it is unsupported by the findings and conclusions entered upon those findings. Id. at 198-99. We will only reverse a termination of parental rights on appeal upon a showing of clear error, which leaves us with a definite and firm conviction that a mistake has been made. Id. at 199.

Discussion and Decision

The involuntary termination of parental rights is the most extreme civil sanction a court can impose; therefore, termination is a last resort, available only when all other reasonable efforts have failed. In re T.F., 743 N.E.2d 766, 773 (Ind. Ct. App. 2001), trans. denied. "The purpose of terminating parental rights is not to punish parents but to protect their children." In re M.M., 733 N.E.2d 6, 12 (Ind. Ct. App. 2000) (citation omitted). Parents have a constitutionally protected interest in the right to establish homes and raise their children; however, those rights may be terminated when parents are unwilling or unable to meet their parental responsibilities. In re T.F., 743 N.E.2d at 773. Parents' rights are subordinate to the interest of protecting the welfare of the child in determining an appropriate disposition of a petition to terminate parental rights. Id.

Termination of a parent-child relationship is proper where the child's emotional and physical developments are threatened. In re A.A.C., 682 N.E.2d 542, 544 (Ind. Ct. App. 1997). The trial court need not wait until the child is irreversibly harmed such that his or her physical, mental, and social development is permanently impaired before

terminating the parent-child relationship. Id. A parent's habitual pattern of conduct is relevant to determine whether there is a substantial probability of future neglect or deprivation of the child. In re M.M., 733 N.E.2d at 13.

To effect the involuntary termination of a parent-child relationship, the DCS must establish that:

> (A) one (1) of the following exists:
>
> (i) the child has been removed from the parent for at least (6) months under a dispositional decree;
>
> (ii) a court has entered a finding under I.C. 31-34-21-5.6 that reasonable efforts for family preservation or reunification are not required, including a description of the court's finding, the date of the finding, and the manner in which the finding was made; or
>
> (iii) after July 1, 1999, the child has been removed from the parent and has been under supervision of a county office of family and children for at least fifteen (15) months of the most recent twenty-two (22) months;
>
> (B) There is a reasonable probability that:
>
> (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
>
> (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
>
> (C) termination is in the best interest of the child; and
>
> (D) there is a satisfactory plan for the care and treatment of the child

Ind. Code § 31-35-2-4(b)(2) (1998). The DCS must establish these elements by clear and convincing evidence. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), trans. denied.

Lothamer "does not deny that the elements of IC § 31-35-2-4(b)(2)(A) and (D) were proven by the Department of Child Services." Brief of Appellant at 6. However, he claims that there was insufficient evidence presented to prove subsections (B) and (C). Lothamer contends that there was no evidence presented that continuation of the parent-child relationship would be harmful to T.M., that the conditions that resulted in T.M.'s

removal would not be remedied, or that termination of parental rights was in T.M.'s best interests.

Although Lothamer appears to raise both elements of Indiana Code § 31-35-2-4(B) on appeal, because the statute is written in the disjunctive, the trial court need only find either that the conditions causing removal will not be remedied or that the continuation of the parent-child relationship poses a threat to the child. In re C.C., 788 N.E.2d 847, 854 (Ind. Ct. App. 2003), trans. denied. We focus our review on the first element.

To determine whether there is a reasonable probability that the conditions which resulted in the removal of a child will not be remedied, the trial court should judge a parent's fitness to care for the child at the time of the termination hearing, taking into consideration evidence of changed conditions. In re L.S., 717 N.E.2d at 209. Due to the permanent effect of termination, the trial court must also evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child. Id. In this regard, trial courts have properly considered evidence of a parent's prior drug and alcohol abuse, history of neglect, failure to provide support, lack of adequate housing, and unemployment. In re A.L.H., 774 N.E.2d 896, 899 (Ind. Ct. App. 2002).

To support his argument, Lothamer maintains that he has made significant changes in the conditions that led to the removal of T.M. from his care. He has completed three parenting skills classes and one class for communication and anger management. He has

also enrolled in college courses and intends to return to his vocation of homebuilder once he is released from prison.

We applaud Lothamer's attempts to rehabilitate himself while in prison, but we cannot ignore his pattern of criminal activity, including drug abuse while on his own, outside the confines and structure of prison. Lothamer has had trouble with the legal system since he was eighteen years old for various offenses. Regarding his drug abuse, Lothamer has been convicted of possession of marijuana, dealing marijuana, as well as the present offense of manufacturing methamphetamine. Lothamer has not taken any drug rehabilitation classes while imprisoned. At the termination proceeding, Lothamer refused to acknowledge his addiction, claiming that he only used methamphetamine occasionally. Where there are only temporary improvements, the trial court may reasonably find that under the circumstances, the problematic situation will not improve. Matter of D.L. W., 485 N.E.2d 139, 143 (Ind. Ct. App. 1985). In light of Lothamer's unwillingness to take responsibility for his past criminal behavior as well as his pattern of drug abuse, there is adequate support for the trial court's determination that Lothamer's drug abuse and criminal activity will likely not be remedied.

Lothamer also argues that there is insufficient evidence to prove that termination of his parental rights is in the best interest of T.M. In determining what is in the best interests of the child, the trial court is required to look at the totality of the evidence. In re D.D., 804 N.E.2d 258, 267 (Ind. Ct. App. 2004), trans. denied. In doing so, the trial court must subordinate the interests of the parents to those of the child involved. Id. Testimony of the DCS caseworker and the guardian ad litem has been found to be

sufficient to support the trial court's conclusion that termination was in the best interest of the child. McBride, 798 N.E.2d at 203.

In this case, not only did the DCS caseworker and the guardian ad litem testify that they believed it was in the best interests to terminate Lothamer's parental rights, but testimony was also presented about the DCS's plan to have T.M. adopted once Lothamer's rights were terminated. Tammy Steele testified that she and her husband planned on adopting T.M. Tr. pp. 15-16. There was also testimony presented that the Steeles have provided T.M. with a safe and caring environment and that he has bonded with the Steeles and considers them his parents. Tr. pp. 15-16, 19-22, 25. T.M. also lives with his half-brother I.M. at the Steeles' home, and the Steeles plan on adopting I.M. as well.

Additionally, as noted above, the trial court should judge a parent's fitness to care for the child at the time of the termination hearing. In re L.S., 717 N.E.2d at 209. At the time of this hearing, Lothamer was incarcerated, and with good time credit he will not be released from prison until 2009. Even after he is released, Lothamer testified it will take a year or more for him to be able to provide for a son. Due to his incarceration, he has not been able to visit regularly with T.M. to form a parent-child bond. Lothamer has also failed to maintain contact with T.M., and has not sent him cards or gifts. It is reasonable to conclude that attempting to reunify T.M. with Lothamer upon his release from prison in 2009 could threaten T.M.'s emotional development, and hence would not be in T.M.'s best interests. See Egly v. Blackford County Dep't of Pub. Welfare, 592 N.E.2d 1232, 1234 (Ind. 1992).

When the evidence demonstrates that the emotional and physical development of a child is threatened, termination of the parent-child relationship is appropriate. In re E. S., 762 N.E.2d 1287, 1290 (Ind. Ct. App. 2002). We emphasize that a trial court need not wait until a child is irreversibly influenced by a deficient lifestyle such that his or her physical, mental, and social growth is permanently impaired before terminating the parent-child relationship. Id. Given T.M.'s bond with the Steeles and his infamiliarity with Lothamer, we conclude it is in the best interests of T.M. to terminate Lothamer's parental rights.

Thus, evidence supports the trial court's findings that the conditions that led to the removal of T.M. will not be remedied and that termination of Lothamer's parental rights is in T.M.'s best interests. Lothamer's request that we determine otherwise is an invitation to reweigh the evidence, which we will not do. See In re J.W., 779 N.E.2d 954, 961 (Ind. Ct. App. 2002), trans. denied.

Affirmed.

NAJAM, J., and MAY, J., concur.